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No. 919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959 A.D.

TED W. BROWN, SECRETARY OF STATE, ET AL.,
Petitioners,

vs.

JAMES I. KELLER, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, appellants below other than Ted W. Brown, Secretary of State, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 8, 1960.

I

OPINIONS BELOW

The memorandum opinion and order of December 4, 1958 (R. 26a) and the supplemental opinion and order of March 16, 1959 (R. 30a) of the United States District Court for the Southern District of Ohio, Eastern Division,

are unreported. The opinion in the United States Court of Appeals for the Sixth Circuit of February 8, 1960 (R. 39a) is reported at 274 F. 2d, 779. True copies of said opinions and orders are appended to this petition in the Appendix hereto at pages 7-17.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered February 8, 1960 (R. 37a). The jurisdiction of this Court is invoked under Section 1254(1), Title 28 U. S. C., which provides:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

III

QUESTIONS PRESENTED

This case involves the question of whether the shareholders of petitioner, The Columbus Mutual Life Insurance Company, can lawfully amend Article V of the charter of that company, prospectively.

Respondents, who claim to be mutual plan, or participating, policyholders of said company sought to enjoin the company's shareholders from amending Article V. The District Court found that under the provisions of Article V equitable ownership of the surplus of the Columbus Mutual Insurance Company is vested in the company's mutual plan or participating policyholders and for that reason enjoined petitioners from taking any action for making effective the proposed amendment to Article V and from taking any action in derogation of Article V as now constituted con-

trary to rights of such policyholders. The Court of Appeals affirmed. The questions presented are:

1. Can the shareholders of the Columbus Mutual Life Insurance Company amend Article V of that company's charter prospectively?

2. Do the mutual plan policyholders of the Columbus Mutual Life Insurance Company possess any vested contractual rights to the future and as yet unearned profits or surplus of that company by virtue of Article V of the company's charter?

3. Did the Court of Appeals err in holding that the proposed amendment to Article V of the Columbus Mutual Life Insurance Company charter would retroactively impair vested rights of the mutual plan policyholders of that company; and, if not, in what respect is said proposed amendment retroactive?

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are Article I, Section 10 of the United States Constitution; Article XIII, Section 2 of the Constitution of the State of Ohio, and Sections 1701.69 and 1701.71 of the Revised Code of Ohio.

V

SUMMARY STATEMENT OF MATTER INVOLVED

As the opinion of the Court of Appeals in this case correctly states, this action, being case No. 13852 in the Court of Appeals, is a companion case to *The Ohio State Life Insurance Company, et al., v. Clark, et al.*, 274 F. 2d, 771, being case No. 13851 in that court, the latter having been commenced in the District Court three days prior to the filing of this action. The jurisdiction of the District Court

was based upon the amount involved, diversity of citizenship and the existence of a question arising under the Constitution of the United States. The two cases arise out of the same facts and present the same legal issues on the merits. The appellants in the Court of Appeals, defendants in the District Court, are the same in both cases except for Ted W. Brown, Secretary of State, who is not a party to the *Clark* case, *supra*. The District Court consolidated the two cases and heard them together. One judgment was entered for both cases by the District Court.

Following the entry of judgment by the District Court the defendants, other than Ted W. Brown, in this case, and in the *Clark* case, *supra*, appealed to the Court of Appeals.

The Court of Appeals affirmed the judgment of the District Court in the *Clark* case, 274 F. 2d., 771, on February 8, 1960, and rendered its opinion as to the merits in that case. With respect to this action, the lower court likewise affirmed the judgment of the District Court on February 8, 1960. In its opinion in this case, however, the Court of Appeals expressly held that:

> "Insofar as the merits of this appeal are concerned, our ruling in No. 13851 [i. e. *The Ohio State Life Insurance Company, et al., v. Clark, et al., supra*] is controlling."

The court below further stated in its opinion in this case that:

> "For all practical purposes * * * this appeal has no useful purpose, since, regardless of how this appeal is decided all of the appellants are bound by the judgment which has been affirmed in case No. 13851, which involves the same factual situation and the same questions of law."

Petitioners, concurrently with the filing of this petition, have filed their petition for writ of certiorari to review the

decision of the Court of Appeals in *The Ohio State Life Insurance Company, et al., v. Clark, et al.*, supra, and reference is made to that petition and to the Appendix attached thereto for a statement of the factual situation and the issues on the merits involved in this case.

VI

REASONS FOR GRANTING THE WRIT

Petitioners do not seek by this petition a review of the decision of the Court of Appeals in this case insofar as it pertains to and determines the capacity of respondents, plaintiffs below, to maintain this action.

Petitioners seek only a review of the judgment of the Court of Appeals on the merits in this case, which judgment is expressly based upon that court's decision in *The Ohio State Life Insurance Company, et al. v. Clark, supra.*

The reasons why the writ should be granted in this case are, accordingly, identical with those set forth in the petition for writ of certiorari filed contemporaneously with this petition by petitioners in *Ohio State Life Insurance Company, et al. v. Clark, et al., supra,* which are incorporated herein by reference.

If, as petitioners contend, the decision of the Court of Appeals in the *Clark* case, *supra,* should be reviewed, then it necessarily follows that the lower court's decision in this case, which is based upon the *Clark* case insofar as the merits are concerned, should likewise be reviewed.

VII

CONCLUSION

For the reasons stated petitioners respectfully pray a writ of certiorari be granted to review the decision of the lower court in this case.

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APPENDIX

Memorandum Opinion and Order of The United States District Court For The Southern District of Ohio, Eastern Division.

[Filed December 4, 1958]

This cause came on to be considered upon cross-motions for summary judgment filed herein by the original parties to the Clark case on April 1, 1958. Counsel for the plaintiffs, Clark et al. and for defendants, Ohio State Life et al., are agreed that there is no genuine issue as to any fact material to a decision on these cross-motions, and that judgment should be entered as a matter of law; but there agreement ends. Each side claims entitlement to such judgment.

Upon agreement of all counsel, the motion of the Superintendent of Insurance of the State of Ohio for leave to intervene was sustained. The intervenor while not joining in either motion takes the postion that one or the other of the motions for summary judgment should be granted, intervenor's interest being confined to the application of the insurance laws of the State of Ohio.

The motion of Plaintiffs in Civil No. 5149, Keller et al. v. Ted W. Brown et al. to have that case consolidated with Civil No. 5146, the Clark case, and to be joined as moving parties on the summary judgment issue having been sustained, the Keller case plaintiffs are aligned with plaintiffs in the Clark case, and they ask that summary judgment be granted as a matter of law in favor of all plaintiffs.

The Court having carefully considered this matter, the voluminous and able briefs filed, and after numerous hearings, and being fully advised in the premises, finds as counsel have agreed that there is no genuine issue as to any material fact and that judgment should be granted as a matter of law.

The basis for this litigation is quite apparently the surplus accumulated by The Columbus Mutual Life Insurance Company, and decision of the question of ownership of those funds between stockholders on the one hand or policy holders on the other, is dispositive of this action.

In the case of United States Life Insurance Co. v. Spinks, 126 Ky., 405, 422 the court had this to say in defining "surplus" and fixing its ownership:

> "The aggregate of all the excessive collections of premiums in that year constitute that year's accumulation of 'surplus.' This fund is sometimes called, or miscalled 'undivided profits' or 'surplus earnings' or the like. But it represents only the aggregate of overcharges of premiums assessed against the policy holders. The greater it is, the greater the unnecessary exaction that has been made by the insurance company for its policy holders in carrying on the business of collecting from them a sufficient sum to pay all of them the sums agreed at their deaths and in the meantime to pay all the legitimate and necessary expenses of maintenance. If the insurance company doing the business were only a stock company, in the absence of statutory regulation, all 'surplus' or 'profits' would belong to the stockholders. It would represent that much more charged for doing the business than it cost, and would be properly profit. But, where the company is a mutual, being conducted on the plan of giving the cheapest safe insurance to its members, all surplus ought to belong to the members, the policy holders. For, in a purely mutual company there are no stockholders, and no one else therefore to whom the surplus could go than its policy holders. And it should in equity go to those who had contributed it * * * In mixed companies—that is, partly stock and partly mutual—the act creating them usually designates the maximum per cent that shall be paid in dividends to the stock, the residue of 'surplus' or 'net earnings' going to the contributing policy holders. * * * The 'surplus' was what was left after paying the dividends to stockholders, all expenses and all losses, and after providing for all death claims and

for maintaining the reserves. Hence, this 'surplus' should be treated as if the company were purely a mutual company."

The Court is of the opinion that the application of the above-quoted language to the instant case will accomplish a fair, just and equitable result. It is certainly clear that Columbus Mutual is not "only a stock company" nor is it "a purely mutual company." The nature of its entity lies somewhere in between, and can be best described, perhaps, as one of the so-called "mixed companies." However, it is immaterial how the entity is characterized, since it is not "only a stock company." Because of the restrictions placed upon the stock of Columbus Mutual in its articles of incorporation and printed upon the face of issued stock certificates, the Court is of the opinion that the principles of the Spinks case, supra, should apply. "Hence, this 'surplus' should be treated as if the company were purely a mutual company," and the surplus "should in equity go to those who had contributed it." This result affords a fair, reasonable and unstrained construction to the language of Article V of Columbus Mutual's articles of incorporation—"* * * the surplus of the company shall belong to the holders of policies on the mutual plan, * * *." The Court is of the opinion that the equitable ownership of the surplus of Columbus Mutual under the Articles is vested in its policy holders on the mutual plan, that is, in the class of which these plaintiffs are representatives; in the aggregate they are entitled to the whole.

Based upon the foregoing, and upon the entire files and records in this consolidated action, the Court finds that defendants' motion for summary judgment is not well taken and should be and hereby is overruled.

The Court further finds that plaintiffs' motion for summary judgment is well taken and should be and hereby is

sustained and judgment should be entered for plaintiffs and against defendants as a matter of law.

However, pursuant to the request of the intervenor, Superintendent of Insurance of the State of Ohio, contained in his memorandum filed May 2, 1958, the Court will withhold the entry of final judgment herein until all parties have had an opportunity to be heard on the propriety of remedies to be granted to the plaintiffs.

Underwood,
Chief Judge, U. S. District Court.

Supplemental Opinion and Order of The United States District Court for The Southern District of Ohio, Eastern Division.

[Filed, March 16, 1959]

On December 4, 1958, the Court entered its memorandum opinion and order upon the cross-motion for summary judgment then pending herein. In that order, the Court overruled defendants' motion for summary judgment and sustained the summary judgment motion of the plaintiffs in the Clark case, Civil No. 5146, in which motion the plaintiffs in the Keller case, Civil No. 5149, had previously been permitted to join as moving parties. Also in its opinion and order of December 4, 1958, the Court acting pursuant to the request of the intervenor, the Superintendent of Insurance of the State of Ohio, withheld the entry of final judgment herein so that all parties might have an opportunity to be heard on the property of remedies to be granted.

However, at a hearing held in open court on January 9, 1959, notice thereof having been given and counsel for all parties being present, the aforementioned request of the intervenor was withdrawn.

Now, therefore, this matter is before the court for consideration of the judgment to be entered herein, and the Court being fully advised in the premises finds as follows:

(a) That the plaintiffs in the Clark case, Civil No. 5146, are mutual plan policyholders of The Columbus Mutual Life Insurance Company and bring said action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure on behalf of themselves and all other mutual plan policyholders of said company;

(b) That the Keller case, Civil No. 5149, was similarly brought as a class action pursuant to said Rule 23(a) by the plaintiffs Keller, Purvis and Johnston, later joined by the plaintiffs Eberst and Strunk;

(c) That the Court has jurisdiction of the parties and the subject matter of this consolidated action wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between citizens of different states.

Based upon the foregoing and upon the memorandum opinion and order entered December 4, 1958, which opinion and order shall be considered with this supplemental opinion and order as the final judgment of the Court, all of which shall be effective from the date hereof, it is ordered, adjudged and decreed that summary judgment be and it hereby is entered in favor of the plaintiffs and against the defendants, and therefore the Court does hereby declare as follows:

(1) That the surplus of The Columbus Mutual Life Insurance Company belongs to its mutual plan policyholders, subject only to the limited rights of its stockholders to receive dividends equal to 10% on the par value ($100.00 per share) of their stock and to receive $200.00 per share for their stock upon its retirement;

(2) That The Ohio State Life Insurance Company and the individual defendants who are stockholders of The Columbus Mutual Life Insurance Company cannot exercise their voting power to relieve their stock of the restrictions and limitations they consented and by which they agreed to be bound when they acquired said stock; and

(3) That the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus without notice or acquiescence if the proposed amendment were permitted.

In addition to the foregoing declarations, the Court is of the opinion that injunctive relief herein is warranted upon the facts admitted in the pleadings and and upon the finding of the Court and the agreement of all counsel that there is no genuine issue as to any material fact. The Court is of the further opinion that Rule 52 of the Federal Rules of Civil Procedure, to the extent that it applies herein, has been sufficiently satisfied without necessity for further findings.

Therefore, it is ordered, adjudged and decreed that the defendants, The Ohio State Life Insurance Company, the Columbus Mutual Life Insurance Company, Frederick E. Jones, Frank L. Barnes, I. Malcolm McCampbell, Thomas F. Ross, David C. Morgan, Howard W. Kraft, Derrol R. Johnson, Allen G. Aigler, Dr. Rees E. Tulloss, Frank A. Burgess, Stanton G. Prentiss, Robert H. Campbell, Walter F. Eberle, Robert N. Lupfer, Edward A. Sauer, Charles F. Bruny, W. Lyman Case, Ben P. Hadley, Donald J. Hoskins, Carl Mitcheltree, Donald C. Power, Jay Shaw Sr., and Danforth E. Ball, Jr., and Ted W. Brown, Secretary of State of the State of Ohio, and each of them, and their agents and servants and all others acting in their aid or assistance or conjunction, or in aid or conjunction of or with any of them, are hereby perpetually enjoined and restrained from:

(A) Taking any action to make effective the proposed amendment to Article V of the Charter of The Columbus Mutual Life Insurance Company; or

(B) Taking any action in derogation of the terms of said Article V as now constituted contrary to the rights of the plaintiffs under said Article V as such rights are declared herein.

It is further ordered, adjudged and decreed that the Court does hereby retain jurisdiction of this consolidated action for all necessary purposes, including modification of the aforesaid injunctive order, if warranted, and consideration of plaintiffs' request that they be awarded their costs and disbursements, including reasonable attorneys fees, and all other questions presented and not determined herein.

Settlement of journal entry hereof not required.

Underwood,
Chief Judge, U.S. District Court.

Opinion of The United States Court of Appeals For The Sixth Circuit

[Filed February 8, 1960]

Before: McAllister, Chief Judge, Miller, Circuit Judge, and Brooks, District Judge.

Miller, Circuit Judge. This action, being No. 5149 in the District Court, and *Clark, et al. v. The Ohio State Life Insurance Co.*, No. 5146 in that Court and filed three days earlier therein, are companion cases arising out of the same facts and presenting the same legal issues on the merits. They were consolidated by order of the District Court and heard together. One judgment was entered for both cases.

Following entry of judgment, the defendants in both actions appealed to this Court. The appeal in action No. 5146 is No. 13,851 in this Court, *The Ohio State Life Insurance Co., et al. v. Ray A. Clark, et al.* We have this day affirmed the judgment in that case.

The appeal in action No. 5149 is No. 13,852 in this Court, which is the appeal herein being considered. Insofar as the merits of this appeal are concerned, our ruling in No. 13,851 is controlling. However, appellants contend that, irrespective of the merits of the case, the District Court lacked jurisdiction in this case and that the judgment, insofar as it applies to action No. 5149, must be vacated.

Reference is made to the opinion in *The Ohio State Life Insurance Co., et al. v. Ray A. Clark, et al.*, No. 13,851, this day handed down, for a statement of the factual situation and the issues involved. The plaintiffs in that action were mutual plan policyholders of Columbus Mutual, suing on behalf of themselves and of all mutual plan policyholders of that company. In this action, filed on November 15, 1957, the three original plaintiffs, Keller, Johnston and Purvis, brought the action as trustees of the employees' retirement fund of Burdines Department Store of Miami, Florida, which retirement fund was the owner of certain mutual plan insurance policies issued by Columbus Mutual. In this action the plaintiffs proceeded against the same defendants as were proceeded against in the other case and also added as a party defendant Ted W. Brown in his capacity as Secretary of State of Ohio. Injunctive relief was sought against the defendants, which the District Court granted.

Although this appeal is styled Ted W. Brown, Secretary of State, et al. v. James I. Keller, et al., the notice of appeal does not include Ted W. Brown, either individually or as Secretary of State, as an appellant. For all prac-

tical purposes, excepting possibly some questions of costs, this appeal has no useful purpose, since, regardless of how this appeal is decided, all of the appellants are bound by the judgment which has been affirmed in case No. 13,851, which involves the same factual situation and the same questions of law. However, we will briefly refer to appellants' contentions.

The defendants by answer filed August 28, 1958, denied that the plaintiffs, Keller, Purvis and Johnston, were trustees of said employees' insurance fund and affirmatively alleged that they were no longer trustees of said Burdines' pension fund. It is claimed in the brief that they ceased to be trustees on August 1, 1958. This is not strictly a question of jurisdiction, but lack of capacity on the part of the plaintiffs to sue is a bar to the action. *Rule 17 (a), Rules of Civil Procedure; Lewis v. Fontenot*, 110 F. (2) 65, C. A. 5th, cert. denied, 311 U. S. 646, rehearing denied, 311 U. S. 727; *Tringali v. Board of County Commissioners*, 176 F. (2) 110, C. A. 10th. The issue was properly raised under the provisions of Rule 9 (a), Rules of Civil Procedure. No action was thereafter taken to substitute successor trustees, if any were needed. No evidence was received on this factual issue and no ruling made thereon. Unless the facts hereinafter stated require a different ruling, a judgment with respect to this case should not have been entered, in the absence of a hearing on the factual issue and an adverse ruling on the defendants' contention. *Dolan v. Jennings*, 139 U. S. 385; *Lucking v. Delano*, 129 F. (2) 283, C. A. 6th.

On February 26, 1958, the attorney for the plaintiffs filed an application on behalf of J. H. Eberst of Columbus, Ohio, to be made a party to the action, which stated that he was a policyholder of Columbus Mutual and had a common, primary right in the suit, the judgment in which,

since it was a class suit, would be binding upon him. An order was entered on April 9, 1958, joining him as a party plaintiff, individually, and as a representative of the class for whose benefit this action was brought. There was thus added as a party plaintiff one who had capacity to sue. Under the circumstances, we are of the opinion that there was a plaintiff entitled to go forward with the action and that it should not have been dismissed for lack of a party plaintiff with capacity to sue. See: *Continental Oil Co. v. Osage Oil & Refining Co.*, 57 F. (2) 527, 529, C. A. 10th.

We find no merit in appellants' contention that when J. H. Eberst was made a party plaintiff it destroyed diversity of citizenship, with resulting loss of jurisdiction. Jurisdiction was also asserted on the ground of the amount in controversy and the existence of a constitutional question.

The judgment is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed February 8, 1960]

Appeal from the United States District Court for the Southern District of Ohio

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ Shackelford Miller, Jr.,
United States Circuit Judge.